RECORD AND BRIEFS

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SUPREME COURT, U.S.

No. 16-658

IN THE

Supreme Court of the United States

CHARMAINE HAMER,

Petitioner,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO & FANNIE MAE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PROFESSOR SCOTT DODSON AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

THE JURISDICTIONAL CHARACTER OF RULE 4(a)(5)(C) DOES NOT RESOLVE THIS APPEAL 3

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) 3, 4

Bowles v. Russell, 551 U.S. 205 (2007) 3, 6, 8

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940) 4

United States v. Cotton, 535 U.S. 625 (2002) 6

Durfee v. Duke, 375 U.S. 106, 111 (1963) 4

Eberhart v. United States, 546 U.S. 12 (2005) 3

Gonzalez v. Thaler, 565 U.S. 134 (2012) 3, 4

Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) (per curiam) 8

Henderson v. Shinseki, 562 U.S. 428 (2011) 3, 4

John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2007) 3

Kontrick v. Ryan, 540 U.S. 443 (2004) 3

Manrique v. United States, Slip Op. No. 15-7250 (U.S. Apr. 19, 2017) 6

Mansfield, Coldwater & Lake Michigan Railway v. Swan, 111 U.S. 379 (1884) 4

Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868) 4

McDonald v. Mabee, 243 U.S. 90 (1917) 4

Morrison v. National Australia Bank, Ltd., 561 U.S. 247 (2010) 3

Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010) 3

TABLE OF AUTHORITIES

Sebelius v. Auburn Regional Medical Center, 133 S. Ct. 817 (2013) 3

Scarborough v. Principi, 541 U.S. 401 (2004) 3

Sinochem International Co. v. Malaysia International Shipping, 549 U.S. 422 (2007) 4

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 3

Teague v. Regional Commissioner of Customs, 394 U.S. 977 (1969) 7

Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen, 558 U.S. 67 (2009) 3

United States v. Wong, 135 S. Ct. 1625 (2015) 3, 4

RULES AND STATUTES

28 U.S.C. § 2107 6-8

Fed. R. App. P. 4 ..... *passim*

Fed. R. Civ. P. 82 7

OTHER AUTHORITIES

Scott Dodson, *Jurisdiction and Its Effects*, 105 Geo. L.J. 619 (2017) 5, 7

Scott Dodson, *Hybridizing Jurisdiction*, 99 Calif. L. Rev. 1437 (2011) 7

Statutory Time Limits to Appeal, 121 Harv. L. Rev. 315 (2007) 8

Transcript of Oral Argument, *John R. Sand & Gravel Co. v. United States*, No. 06-1164 (U.S. Nov. 6, 2007) 8

INTEREST OF *AMICUS CURIAE*

I am a Professor of Law at the University of California Hastings College of the Law, where I teach and write on federal jurisdiction and procedure. I have an academic and pedagogical interest in the clarification of the boundaries, scope, and regulatability of federal jurisdiction. On that basis, I submit this blissfully short brief in support of neither party to aid the Court's consideration of these issues.[1]

SUMMARY OF ARGUMENT

In this case, the district court issued an order extending Petitioner's time to appeal the judgment in her civil case beyond the deadline in Rule 4(a)(5)(C) of the Federal Rules of Appellate Procedure. Petitioner, proceeding *pro se*, then filed her notice of appeal within the order's timeframe but outside the Rule's deadline. Respondents neither objected to this course of action in the district court nor challenged the timeliness of Petitioner's appeal in their initial appellate submission—a Joint Corrected Docketing Statement—to the Court of Appeals.

The precise issues directly confronting the parties and the Court of Appeals were (and are):

> (1) whether the district court had discretion to allow Petitioner to file her notice of appeal beyond the deadline prescribed in the Rule;

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[1] My institutional affiliation is provided for identification purposes only. No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund its preparation or submission. All parties have filed blanket consents to amicus briefs in support of neither party.

(2) if not, whether Respondents' conduct disables them and the Court of Appeals from considering the appeal to be untimely under the Rule; and

(3) if not, whether the Court of Appeals may use principles of equity to excuse Petitioner's noncompliance with the Rule.

Rather than analyzing these issues directly through traditional tools of statutory and rule construction, the Court of Appeals instead raised and answered, *sua sponte*, a wholly different question: whether the Rule's deadline is jurisdictional. Answering *that* question in the affirmative, the Court of Appeals then held that the deadline's jurisdictional character automatically resolved each of the three issues in the negative.

The flaw in that reasoning is that answering the jurisdictional question does not resolve the three issues confronting the parties. The Court of Appeals happens to have been correct that Rule 4(a)(5)(C) sets a jurisdictional deadline. But that jurisdictional deadline might still allow for judicial discretion, party waiver, or equitable considerations in a specific case. Resolving whether the deadline could be extended, forfeited, or excused is an exercise in rule construction, not an inexorable result of its jurisdictional character. The Court of Appeals was wrong, therefore, to hold that the Rule's jurisdictional character necessarily resolved the appeal, and this Court should dispose of this appeal—whether by affirmance, reversal, or vacatur—without adopting the Court of Appeals's reasoning.

ARGUMENT

THE JURISDICTIONAL CHARACTER OF RULE 4(a)(5)(C) DOES NOT RESOLVE THIS APPEAL.

1. Nearly two decades ago, this Court, concerned that "[j]urisdiction . . . is a word of many, too many, meanings," embarked on a mission to bring clarity to jurisdictional doctrine. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted).

The Court's ensuing opinions have succeeded in bringing thoughtfulness and attention to questions of jurisdiction. *See, e.g.*, *United States v. Wong*, 135 S. Ct. 1625 (2015); *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817 (2013); *Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Henderson v. Shinseki*, 562 U.S. 428 (2011); *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen*, 558 U.S. 67 (2009); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Kontrick v. Ryan*, 540 U.S. 443 (2004).

These opinions have not, however, attempted to clarify the *meaning* of jurisdiction. Instead, they offer a framework for determining whether a limit should be characterized as jurisdictional. This framework offers two main guideposts: "claim-processing rules" are nonjurisdictional, *Kontrick*, 540 U.S. at 455, and a limit is jurisdictional when Congress clearly intends it to be so, *Arbaugh*, 546 U.S. at 514-15.

These guideposts, however, are incompatible. If Congress can deploy the jurisdictional label as it wishes, then Congress can deploy it for claim-processing rules. *See Henderson*, 562 U.S. at 435; *Gonzalez*, 565 U.S. at 169 (Scalia, J., dissenting).

Further, divining Congress's intent on the characterization question has proven difficult, despite the clear-statement rule, almost certainly because Congress rarely considers the question itself when phrasing statutory limits. *Compare, e.g.*, *Wong*, 135 S. Ct. at 1632-33 (claiming textual support for a nonjurisdictional characterization), *with id.* at 1640-42 (Alito, J., dissenting) (claiming the same textual support for a jurisdictional characterization).

The root of these characterization problems is that jurisdiction's *meaning* remains elusive. For many years, courts have defined jurisdiction as a fundamental "power," without which a court can only dismiss for lack of jurisdiction. *See McDonald v. Mabee*, 243 U.S. 90, 91 (1917); *Mansfield, Coldwater & Lake Mich. Ry. v. Swan*, 111 U.S. 379, 382 (1884); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

But jurisdiction is not a force field; nothing physically prevents a court from issuing a judgment without jurisdiction. Further, this Court has allowed federal courts to resolve cases on nonmerits grounds without first assuring themselves of jurisdiction. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431-32 (2007). And even merits judgments entered by a court without jurisdiction can become binding and enforceable on the parties. *See Durfee v. Duke*, 375 U.S. 106, 111 (1963); *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940).

In addition, the definition of "power" (or even just "authority") offers no conceptual difference between jurisdictional limits and nonjurisdictional limits. Both kinds of limits restrict lawful judicial power and authority. A court has no more authority to enter a judgment against a defendant for baldness discrimination under Title VII, or in case filed beyond the limits imposed by a statute of repose, than to enter a judgment against a defendant in a $50,000 diversity case. The jurisdiction-as-power trope does not help distinguish jurisdiction from nonjurisdiction.

2. Jurisdiction's meaning is this: jurisdiction sets boundaries between adjudicative forums. It defines both where a dispute belongs and where it does not. Jurisdiction provides answers to the following questions: When can a case be filed in federal or state court? (Original jurisdiction.) When does a case move from district to appellate court? (Appellate jurisdiction.) Which states' courts can hear a case and which cannot? (Personal jurisdiction.) Jurisdiction erects both the fences that separate adjudicative forums and the gates cases pass through from one forum to another. *See* Scott Dodson, *Jurisdiction and Its Effects*, 105 Geo. L.J. 619, 634-37 (2017).

Nonjurisdictional rules, in contrast, limit a court's authority irrespective of other courts. Common examples include the constraints of due process, statutes of limitations, damages caps, the scope of statutory coverage, the power to shift fees, service of process, and the like. *See id.*

Thus, the deadline to file a notice of appeal is different from a statute of limitations—but not because one is about power and the other is not. Rather, the deadline to file a notice of appeal is

jurisdictional because it sets a boundary of authority between courts, *cf. Manrique v. United States*, Slip Op. No. 15-7280, at 3 (U.S. Apr. 19, 2017) ("Filing a notice of appeal transfers adjudicatory authority from the district court to the court of appeals."), while a limitations period is nonjurisdictional because it cabins the authority of a court without regard to other courts.

3. While jurisdiction is *definitionally* distinct from nonjurisdiction, its *effects* are indistinct. It is often said that jurisdictional limits, unlike nonjurisdictional rules, are insusceptible to principles of equity, judicial discretion, and party waiver, and that they must be raised sua sponte by the court. *See United States v. Cotton*, 535 U.S. 625, 630 (2002). But this is simply untrue. A jurisdictional rule, like a nonjurisdictional rule, has whatever effects that particular rule or applicable law provides.

Take, for example, the statutory deadline to file a civil notice of appeal. The deadline is jurisdictional because it establishes a boundary dividing authority over a case between the district and appellate courts. *Cf. Bowles*, 551 U.S. at 209-10 (characterizing the deadline as jurisdictional). Yet the statute specifically gives courts discretion to extend the deadline based upon party conduct and equitable circumstances:

> "The district court may, upon [timely] motion . . . , extend the time for appeal upon a showing of excusable neglect or good cause."

28 U.S.C. § 2107(c).

Although the statutory deadline is jurisdictional, it is not unyielding. Rather, it moves to accommodate judicial discretion ("may"), party conduct ("upon

[timely] motion"), and certain equitable principles ("excusable neglect or good cause"). Section 2107(c) is not unusual; many jurisdictional statutes and doctrines exhibit such effects. *See* Scott Dodson, *Hybridizing Jurisdiction*, 99 Calif. L. Rev. 1439, 1457-80 (2011). The resulting jurisdictional boundaries are more circuitous and flexible than straight and rigid, but they are no less jurisdictional.

Could a jurisdictional rule exhibit flexibility *not* specified in its text? The answer depends upon ordinary principles of statutory (or rule) construction. For a rule construed to be confined to its express textual terms, perhaps not; for one construed to incorporate implicit considerations, perhaps yes. *Cf. Teague v. Reg'l Comm'r of Customs*, 394 U.S. 977, 981-84 (1969) (Black, J., dissenting from denial of cert.) (construing the jurisdictional deadline for filing a civil petition for certiorari as implicitly incorporating flexibility for "certain extenuating circumstances"). The point is that a rule's effects depend upon the construction and application of the particular rule, not upon its jurisdictional status.

4. Applying these principles, the Court of Appeals was correct to characterize Rule 4(a)(5)(C) as jurisdictional. The deadline is part of the boundary dividing authority between the district courts and the courts of appeals. It is by definition jurisdictional. *See* Dodson, 105 Geo. L.J. at 639-40.[2]

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[2] Because the definition of jurisdiction is not dependent upon the type of law, it is irrelevant that the deadline is in a Rule rather than a statute. Nevertheless, three additional points on this issue are worth noting for purposes of this case. First, the Federal Rules of Appellate Procedure—unlike Rule 82 of the Federal Rules of Civil Procedure—do not disclaim effects on

Though correctly characterizing the deadline in Rule 4(a)(5)(C) as jurisdictional, the Court of Appeals was wrong to conclude that the deadline's jurisdictional status leads inexorably to rigidity. Just as with 28 U.S.C. § 2107(c), a rule can have whatever effects the rule and applicable law provide, and those effects are independent of its jurisdictional character.

Thus, the question of whether Rule 4(a)(5)(C)'s deadline admits of the kind of flexibility sought by Petitioner—such as through judicial discretion, party waiver, or equitable circumstances—must be determined by direct construction and application of the Rule, not by resort to its jurisdictional character.

The Court of Appeals erred in concluding otherwise, and this Court should not compound its error by affirming solely on the ground that the Rule's deadline is jurisdictional.

(continued...)

jurisdiction. Second, the statutory deadline to appeal a civil case, held jurisdictional by *Bowles*, 551 U.S. at 210-12, postdated Rule 4's appellate deadline and was amended to conform to that Rule deadline, *see Statutory Time Limits to Appeal*, 121 Harv. L. Rev. 315, 322-24 (2007); *cf.* Transcr. of Oral Arg. at 44, *John R. Sand & Gravel Co. v. United States*, No. 06-1164 (U.S. Nov. 6, 2007) (acknowledging this point). Third, much of the "century's worth of precedent and practice" characterizing appellate deadlines as jurisdictional and on which *Bowles* heavily relies, 551 U.S. at 209 n.2, focused on Rule 4 rather than on a statute, *see, e.g., Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam) (citing only Rules). In sum, deadlines to appeal are jurisdictional because they are deadlines to appeal, not just when they are statutory.

CONCLUSION

For these reasons, this Court should dispose of this case in one of two ways. Ideally, this Court should vacate and remand to allow the Court of Appeals to address the issues directly confronting the parties in the first instance, based on its construction and application of Rule 4(a)(5)(C) to the facts of the appeal. In the alternative, this Court itself can construe and apply the Rule to the issues confronting the parties, and, depending on the outcome, either affirm or reverse the Court of Appeals.

Respectfully submitted,

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